No. 22,415

IN THE

United States Court of Appeals

For the Ninth Circuit

IRVIN RAPOPORT,
Appellant,

vs.

ROSE RAPOPORT, also known as JOAN SIROTT,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPENING BRIEF

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NOTE: Other authorities cited in quotations from the autho listed *supra,* either in the body of such quotations footnotes thereto, and which appear in this Brief result of such quotation only, are not themselves in the foregoing compilation of authorities.

Abbreviations Used in This Brief

"CT . . ." refers to the clerk's transcript and pagination.

"RT . . ." refers to the reporter's transcript and pagination hearing held July 31, 1967.

"X" refers to exhibits offered at said hearing by both appella and appellee.

Note: All emphasis used in this Brief has been added by co except where otherwise indicated.

No. 22,415

United States Court of Appeals

For the Ninth Circuit

IRVIN RAPOPORT,	*Appellant,*
vs.	
ROSE RAPOPORT, also known as JOAN SIROTT,	*Appellee.*

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPENING BRIEF

This is an appeal from a judgment entered by the United States District Court for the District of Nevada declaring appellee's alleged Nevada divorce decree on July 6, 1964, to be valid, and by so doing, refusing by necessary implication the extension of Full Faith and Credit to a Pennsylvania Decree previously entered on June 24, 1964, permanently restraining appellee, *inter alia,* from pursuing her Nevada action. This judgment of the Court below arose from an Action for Declaratory Judgment instituted by appellant, praying for a declaration that since the Pennsylvania injunction was entitled to the

protection of the Full Faith and Credit clause[1] and the Fourteenth Amendment of the Constitution, the later Nevada divorce decree was null and void.

JURISDICTION

Jurisdiction of the District Court is based upon 28 U.S.C. §2201 (the Federal Declaratory Judgment Act) and 28 U.S.C. §1332. Jurisdiction of this Court is based upon 28 U.S.C. §2201. The judgment was entered August 23, 1967 (CT 163, 164). The Notice of Appeal was filed within the 30-day period provided by 28 U.S.C. § 2107.

STATEMENT OF THE CASE

On December 19, 1963, appellee instituted an Action for Divorce in Montgomery County, Pennsylvania (XI, RT 6, CT 263) alleging in her Complaint both her residence and that of appellant in said county (XI, RT 6, CT 265). On January 9, 1964, an Appearance and Warrant of Attorney was filed for appellant (as defendant therein) (XI, RT 6, CT 276-280), and that same day appellant ruled his wife for a Bill of Particulars (XI, RT 6, CT 281). On February 24, 1964 she filed a Petition seeking alimony pendente lite, to which he responded on February 26 by filing an Answer alleging that wife had removed from the

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[1]Article IV, § 1, Constitution of the United States: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . ."

home (where they had lived with two teen-age children) in order to "live with her paramour, one George Sirott" and that since the institution of the suit, she and Sirott had "been living together in open, notorious adultery" and that he was supporting her more than adequately, being "a wealthy man" (XI, RT 6, CT 290).

On the basis of this Answer, the Court on March 6, 1964 ordered that depositions be taken within 90 days (XI, RT 6, CT 283), and *appellant* thereupon, on April 2, 1964, noticed his wife for the same, to be held on April 6, 1964 (XI, RT 6, CT 293). Appellee responded by filing a Motion for Protective Order on April 3, 1964 to avoid being deposed. This document does not disclose any claim *that she had already moved to Reno and intended to live there,* although such reason might have defeated the taking of her depositions (X 1, RT 6, CT 303) *and in her Nevada suit for divorce, she claimed residence in Nevada since March 25, 1964* (X 3, RT 7, CT 29) *nine days earlier.*

On April 17, 1964, counsel for both parties agreed to continue this Motion to May 1, 1964 (X 1, RT 6, CT 302), on which date, appellant having previously filed an Answer thereto (X 1, RT 6, CT 297-300), the Court, on appearance of both counsel, ordered this Motion also on the Argument List after the taking of depositions (X 1, RT 6, CT 301).

Six days later, on May 7, 1964, appellee commenced her action for divorce in Reno, Nevada (X 3, RT 7, CT 29) (even though, as we have seen, she had con-

tinued to press her Pennsylvania action during the alleged prior six-week residence in Nevada).

Appellant was neither served nor did he appear personally or by counsel in the Nevada action (CT 157). Instead, he filed a Complaint in Equity in Pennsylvania seeking an injunction to restrain his wife from proceeding with the Nevada suit, and secured a preliminary injunction on May 20, 1964 on his affidavit setting forth all the foregoing facts (X 2, RT 6, CT 194-196).

Service of the same was made upon appellee at her Pennsylvania residence; on both her Pennsylvania and Nevada attorneys; the Nevada Clerk of Courts (who promptly sent it back with a printed form requesting an Appearance and a fee); on the Attorney General of Nevada; and on all the judges of the Washoe County Court; by registered mail (X 4, RT 8). On this service and the succeeding ones, most of the Notices addressed to the judges were returned unopened, marked either "Unclaimed" or "Refused" (X 4, RT 8). The Pennsylvania Court having fixed June 24, 1964 as the date for a hearing on the merits, notice of this hearing was served as before, with the same results (X 4, RT 8). On that date, appellee not being present, appellant testified and produced his wife's letters postmarked March 31, April 28 and May 6, 1964 from New Jersey (X 15, 16, 17, RT 13-16, 18, 19) the first two bearing, in appellee's handwriting, her Pennsylvania residence as the return address (RT 14, 15). The Court thereupon concluded that this evidence sustained appellant's averments

and established not only the existence of a prior and pending action on the same subject matter, but appellee's fraudulent attempt to secure a false but colorable residence in Nevada; and entered a Permanent Decree enjoining her (in six sections) from interfering with her husband's marital and property rights, including pursuit of the Nevada divorce. The Court did not merely "confirm" or "continue" the temporary injunction, but entered an entirely new Decree (X 2, RT 6, CT 244, 245).

Service of this Decree was effected as before, the major difference being that appellee was physically handed the same in Reno (X 2, RT 6, CT 262).

Two days later, she received an *ex parte* divorce from a judge who indicated on the record that he had knowledge of this Decree (X 3, RT 7, CT 43); and that same day went through a marriage ceremony with Sirott at which her Nevada attorneys were her witnesses (X 12, RT 13).

As a result, appellant instituted his Action for Declaratory Judgment, averring specifically (a) the prior exclusive jurisdiction of Pennsylvania over both parties and subject matter; (b) the prior and valid Pennsylvania Decree of Injunction and its entitlement to Full Faith and Credit, with the resultant *res judicata;* and (c) the consequent nullity of the Nevada decree and violation of Due Process arising therefrom (CT 5-8).

Appellee's Motion for Summary Judgment being denied (CT 106-8), appellee was deposed on July 26,

1967, and the case tried by the Learned Court below on July 31, 1967. The only fact issue was the subsidiary one of appellee's domicile between March 25 and May 7, 1964 (subsidiary because no challenge, by pleadings or otherwise, to the accuracy and regularity of the records establishing Pennsylvania's prior jurisdiction over parties and subject matter and the decree of injunction it entered, based on the same—X1, X2—was ever made by appellee). This single issue was accordingly tried.

This trial resulted in the entry of the judgment from which plaintiff appeals.

QUESTIONS PRESENTED

(1) Under the facts, did not Pennsylvania possess prior exclusive jurisdiction over both parties and subject matter, and retain that jurisdiction in all subsequent proceedings arising therefrom?

(2) Since the Pennsylvania decree of June 24, 1964 arising from such exercise of jurisdiction, is not merely the prior decree, but a valid final decree, is it not entitled to Full Faith and Credit under Article IV, § 1 of the Constitution of the United States?

(3) Was not the Nevada Court, under the doctrine of *res judicata,* barred from subsequently litigating the same issues in an identical suit between the same parties, and entering judgment thereon?

(4) Is not such Nevada judgment void for lack of jurisdiction, and consequently in violation of the Fourteenth Amendment to the Constitution?

(5) Is not the acceptance and validation of such Nevada decree by the Learned Court below at variance with the ruling of the United States Supreme Court in *Sutton v. Leib?*

(6) Did not the Learned Court below, under the circumstances, commit basic error by finding that Pennsylvania lacked jurisdiction over the subject matter and that Nevada had acquired the same?

(7) Did not the Learned Court below commit basic error in finding that appellee was a Nevada domiciliary?

(8) Did not the Learned Court below commit basic error in applying both Federal and Pennsylvania case law to the instant facts?

SPECIFICATION OF ERRORS

Pursuant to Rule 18 (d) of this Court, appellant respectfully submits that the District Court erred:

1. When it failed to find under the facts that Pennsylvania possessed prior exclusive jurisdiction over both the parties and the instant subject matter.

2. When it failed to find as a matter of law that Pennsylvania retained such jurisdiction in the subsequent equity proceeding arising from the same subject matter.

3. When it failed to find that the Pennsylvania decree of June 24, 1964 was the prior decree over the parties and the subject matter.

4. When it found that said Pennsylvania decree was not final but provisional.

5. When it failed to afford said Pennsylvania decree Full Faith and Credit as prayed for by appellant, in the case at bar.

6. When it failed to find that the Nevada Court was barred by *res judicata,* from making findings concerning its own jurisdiction over the parties and subject matter.

7. When it failed to find that the resultant Nevada decree was accordingly void and in violation of the Due Process clause of the Fourteenth Amendment.

8. When the Court itself challenged the jurisdiction of the Pennsylvania Court, although likewise barred by *res judicata.*

9. When it entered judgment at variance with the principle established by *Sutton v. Leib.*

10. When it found as a fact that appellee was a Nevada domiciliary when the Pennsylvania Court, under the facts, is conclusively presumed to have previously found that she was not.

11. When it found that Nevada had jurisdiction over the parties and subject matter sufficient to create a valid divorce.

SUMMARY OF ARGUMENT

I. Pennsylvania had prior exclusive jurisdiction over both parties and subject matter, and retained said jurisdiction in all proceedings arising from the same.

II. The Decree of Injunction it entered on this basis was therefore not only the prior judgment, but the prior valid and final judgment; the fact that it was a Decree in Equity rather than a judgment at law is immaterial; and such a judgment is entitled to Full Faith and Credit under Article IV, § 1.

III. That as such, it is valid in Nevada and in the Federal Court for Nevada as well as Pennsylvania, under *Sutton v. Leib.*

IV. That the Nevada state Court and the Learned Court below are both barred from attacking Pennsylvania's finding of jurisdiction and the facts on which that jurisdiction is based, under the doctrine of *res judicata.*

V. That the Nevada decree was therefore void for lack of jurisdiction, and was thus in violation of the Fourteenth Amendment; and the Court below erred in finding that the Nevada Court possessed the same.

VI. That the Court below erred in holding that the *March Estate* case controlled the instant facts adversely to appellant's position when in fact that case is clearly distinguishable.

ARGUMENT

Since it is clear from all the pleadings, testimony, exhibits and memoranda filed in this case, that the fundamental question facing your Honorable Court is what evaluation or credit is to be accorded two conflicting decrees: (1) The Pennsylvania decree of June

24, 1964, enjoining and restraining appellee from securing a divorce decree in a subsequent Nevada action, rather than the one in which she was then actively engaged in Montgomery County, Pennsylvania, or remarrying on the basis of such decree; and (2) The Nevada decree of July 6, 1964, granting her such divorce: it would appear appropriate to strip away all collateral problems and, in the interest of analysis, attack one fundamental question first:

Did either of the Courts entering these decrees, *when they were entered,* have to take into consideration the effect of the other?

The Pennsylvania decree was entered, as indicated *supra,* almost two weeks before the other; and the documents, affidavits of service, and notes of testimony in the Nevada state Court resulting in the Nevada decree (X 3, RT 7; CT 43) leave no doubt that appellee, her agents, and even the Nevada Court had knowledge of the nature of the Pennsylvania decree on July 6, 1964 (when the Nevada decree was entered).

Since it will further be noted (Statement of the Case, *supra,* p. 2 this Brief) that appellee herself first placed her marital status in issue in Pennsylvania on December 19, 1963, does this fact, under the law, have any bearing on the choice of our initial inquiry?

Appellant respectfully submits that it does; that by case law so well-established and so uniform as to reduce the principle to hornbook status, the state which has acquired prior jurisdiction over the parties and the subject matter is entitled to exclude another Court

from taking subsequent action over the same parties and issues; that the first Court to assume and exercise such jurisdiction acquires exclusive jurisdiction: *Simmons v. Sup. Ct.,* 96 Cal. App. (2d) 119, 214 P(2d) 844 (1950); *Williams v. Payne,* 150 Kan. 462, 94 P (2d) 341 (1939): that, moreover, such Court should be permitted to retain its jurisdiction without interference from other states. *James v. Grand Trunk Western R. Co.,* 14 Ill.(2d) 356, 152 NE(2d) 858 (1958) in commenting on this rule, refers to former Illinois decisions in the following language:

> "Consequently, those decisions" *(Kleinschmidt v. Kleinschmidt,* 343 Ill. App. 539, 99 NE(2d) 623, and *Allen v. Chicago G.W.R.Co.,* 239 Ill. App. 238) "lend authority to plaintiff's contention that a court which first obtains jurisdiction on the merits should be permitted to retain it until the cause is finally adjudicated, without interference from the courts of other states. In fact, the *Allen* case reaffirms and quotes from the *Kavanaugh* case, where that rule is stated at page 183 of 233 Ill., at page 181 of 84 NE: 'A person has the right to select such tribunal having jurisdiction as he chooses for the prosecution of his rights and the court which first obtains jurisdiction will retain it. Such jurisdiction cannot be defeated because the defendant may prefer another tribunal in which he supposes the decision will be more favorable to him.'"

The Federal rule is the same. *Cole v. Cunningham,* 133 U.S. 107, 10 S.Ct. 269 (1890). This has also been the Pennsylvania rule since the venerable case of *Mc-*

Pherson v. Cunliff, 11 S. & R. 422, 429, 14 Am. Dec. 642 (Pa. 1824). For exhaustive annotations on this general principle, see 54 A.L.R. (2d) 1240, which flatly states, citing many cases, in § 2, p. 1243:

> "Irrespective of the domicile of the spouse seeking the divorce, injunctive relief will be granted where the courts of the injunction forum have first acquired jurisdiction of a matrimonial action between the parties" (which) "would be deprived of its effect by the maintenance of a divorce action in a foreign jurisdiction."

We are therefore obliged to assume that such a Court, under threat of divestiture of its jurisdiction in another state, will take some step resulting in an order, judgment or decree to prevent this from occurring, and seek to have it act as a bar to the foreign proceeding. It is submitted that our next inquiry is, logically, a three-fold one: (1) What kind of judgment is required, under our law, before it may be considered to act as a bar to such other proceeding? (2) What kind of judgment was entered by the Pennsylvania Court (in the instant case, the Court of prior jurisdiction) in its attempt to bar the appellee in the Nevada action, and did it have the power to enter such a judgment? (3) Did its judgment qualify, under the requirements of Number (1) *supra,* to act as a bar, and if so, to what extent and on what issues?

Upon the answers to these questions, appellant suggests, hinges the obligation of the sister state (Nevada) to either extend or refuse Full Faith and Credit to the Pennsylvania judgment, under Article IV, Section 1,

of the Constitution of the United States. *Williams v. North Carolina,* 317 U.S. 287, 63 S.Ct. 207 (1942).

The questions will be considered in order.

1. The accepted definition of a valid judgment in this connection (which can be supplemented by copious case law from every jurisdiction) is found in The Restatement of the Law, *Conflict of Laws,* § 429, as follows:

> "A judgment, decree or other order of a court is valid if, but only if:
>
> "(a) it is rendered by an impartial tribunal after reasonable notice and an opportunity to be heard has been given to all persons to be bound thereby;
>
> "(b) the state in which it is rendered has jurisdiction to act judicially
>
> "(i) with respect to the person affected, or
>
> "(ii) with respect to the subject matter thereof;
>
> "(c) no limitation upon the exercise of judicial jurisdiction by the state has been exceeded;
>
> "(d) the court is competent by the law of its state to exercise judicial jurisdiction."

From this recognized definition flows the corollary that:

> "A valid judgment rendered in one state will be recognized in another state as imposing upon the party against whom it was rendered a duty to obey the judgment, or as determining interests in a thing or the status of the parties."
>
> Restatement, *Conflict of Laws,* § 430.

It is to be noted that the phrase is not "should be recognized" or "might be recognized": it is the mandatory "will be recognized." A valid judgment is not entitled merely to some, but full faith and credit in a sister state. *Davis v. Davis,* 305 U.S. 32, 59 S.Ct. 3 (1938); see also *Dorney v. Dorney,* 245 F(2d) 201 (4 Cir. 1957).

We see at once that a mere preliminary or interlocutory decree of injunction, being issued on *ex parte* affidavits and without adequate notice to the other side, will not qualify at all under the above definition; but appellant is not urging that his Preliminary Injunction of May 20, 1964 is valid *for the purpose of extending it Full Faith and Credit.* His scrutiny is directed to the facts supporting the Decree of June 24, 1964, permanently enjoining appellee from proceeding with her pending Nevada divorce action or remarrying upon the supposed validity of any decree so entered, or otherwise interfering with the marital or property rights of appellant. (This is the decree characterized by the Court below as "confirming the preliminary injunction" (CT 158); this will be discussed *infra*).

2. The entire record before this Honorable Court discloses that the Court of Common Pleas of Montgomery County, Pennsylvania, a Court having equity jurisdiction as well as jurisdiction in divorce matters: *Strank v. Mercy Hospital,* 383 Pa. 54, 117 A(2d) 697 (1955): heard the case (X 2, RT 6); notice of the Preliminary Decree of May 20, 1964 and of the hearing for a Permanent Injunction to be held on June 24, 1964 was afforded by timely notices, *which were received,*

by her Pennsylvania attorney who had instituted *on appellee's behalf* (X 2, RT 6) a Pennsylvania action for divorce previously (RT 12) which was still in progress (X 1, RT 6); on her Nevada attorney (X 4, RT 8); on the Clerk of Courts of Washoe County, Nevada (X 4, RT 8); and at the Pennsylvania residence which defendant herself had sworn to be her residence, under affidavit, in the Pennsylvania Court (X 2, RT 6). All of these persons (and others) were supplied not only with copies of plaintiff's Complaint in Equity for an Injunction, but copies of both the Preliminary and Permanent Decrees when issued (X 2, RT 6; X 4, RT 8). *The defendant herself received physical, personal service of the Permanent Decree of Injunction before she set foot in the Nevada Court to testify and receive her Decree of Divorce.* (X 2, RT 6).

All of the foregoing is a matter of record in the case at bar, elicited either in testimony or properly introduced documents, or both; and it establishes, beyond peradventure of doubt, that a properly constituted Pennsylvania Court, after due notice and hearing, entered an injunction against her.

Since the requirements of the Restatement's Section 429(a) and (d) have clearly been met, it remains only to be seen whether the jurisdictional requirements set forth in (b) and (c) have also been present.

Appellant respectfully submits that they have most decisively been met, the principles of law applicable to this case being set forth once again in the Restatement, *Conflict of Laws,* in § 76 and § 77(1)(e), pp. 114, 115, as follows:

"Section 76. Continuation of Jurisdiction. If a court obtains jurisdiction over a party to an action, that jurisdiction continues throughout all subsequent proceedings which arise out of the original cause of action."

"Section 77. Bases of Jurisdiction. (1) The exercise of jurisdiction by a state through its courts over an individual may be based upon any of the following circumstances:

. . . . . .

(e) He has by acts done by him within the state subjected himself to its jurisdiction."

Appellee herself instituted an *action for divorce* on December 19, 1963 (X 1, RT 6, CT 265-273) in the very jurisdiction which she now claims was incapable of entering an order controlling (of all things) *her marital status.* It is difficult to see what other status she had indeed called upon it to adjudicate by commencing this suit. In her Complaint she averred her residence to be 1355 Overbrook Road, Montgomery County, Pennsylvania (the jurisdiction in which she had started suit), and her Pennsylvania citizenship (X 1, RT 6, CT 265). *Nowhere in any of her succeeding pleadings in this action did she ever aver her change of residence or domicile, although in her Motion for Protective Order filed April 3, 1964 (X 1, RT 6, CT 303) it would have been advantageous for her to do so; and as of April 3, 1964, she now claims to have resided in Nevada for the previous ten days.*

Under Pennsylvania law (which must of necessity determine the validity of a Pennsylvania decree), a domicile once established is conclusively presumed to

continue *until the party alleging the change proves, by a preponderance of the evidence, that the domicile has in fact changed. In re Coulter's Estate,* 406 Pa. 402, 178 A(2d) 742 (1962); *Obici's Estate,* 373 Pa. 567, 97 A(2d) 49 (1953); and *Smith v. Smith,* 364 Pa. 1, 70 A(2d) 630 (1950). See, also, *Sirott v. Sirott, infra,* this Brief. This appellee never even attempted to do.

Nor has she been aided in this respect by appellant, who steadfastly asserted her Pennsylvania residence and domicile in all relevant pleadings in the Pennsylvania divorce action (X 1, RT 6, CT 293) and in his equity suit seeking an injunction (X 2, RT 6, CT 180-182, 185).

Moreover, she was still actively pursuing her Pennsylvania action on May 1, 1964, when her Motion for Protective Order was continued by the Pennsylvania Court for the taking of depositions (X 1, RT 6, CT 301).

On May 1, 1964, then, the Pennsylvania Court had jurisdiction over the subject matter because *appellee* had submitted that subject to a Court of a jurisdiction competent to consider it; over the appellant, by personal service of process; and over appellee herself by virtue of her voluntary submission.

It is almost axiomatic that when one state Court acquires jurisdiction of the subject matter of the case, no Court of coordinate jurisdiction will interfere with its action, or entertain a second suit involving the same subject matter, subject only to the qualification that in the first suit, the party who would be plaintiff

in the second case (here, the appellee) is afforded an adequate and complete opportunity for adjudication of her rights. This is unquestionably the law of Nevada. *Mendive v. Third Judicial District,* 70 Nev. 51, 56, 253 P(2d) 883 (1953); *Metcalfe v. Second Judicial District,* 51 Nev. 253, 274 Pac. 5 (1929).

In fact, by Nevada law so well established that it goes back more than seventy years, not even the consent of both parties will operate to divest one Court of its jurisdiction and confer it on another. *Gamble v. First Judicial District,* 27 Nev. 233, 246, 74 Pac. 530 (1903); *Ex parte Gardner,* 22 Nev. 280, 39 Pac. 570 (1895).

Nevada has also held that even the Court itself may neither invest nor divest itself of jurisdiction by an erroneous ruling made in its exercise. *Pacific States Sec. Co. v. District Court,* 48 Nev. 53, 226 Pac. 1106 (1924).

On May 1, as we have seen, appellee was diligently pursuing the cause in Pennsylvania. How dare we presume, then, that she alone, moving unilaterally and actuated exclusively by self-interest, could divest the Pennsylvania Court of jurisdiction and confer it on Nevada?

Nevertheless, *just six days later, on May 7, 1964,* she commenced an action for divorce in Nevada, in which she asserted, and the Nevada Court found, that it had jurisdiction.

In view of all of the foregoing, we are led to ponder by what legal prestidigitation this miracle was accomplished.

It is inevitable, after recital of the facts *supra* relating to Pennsylvania's prior jurisdiction over both the parties and subject matter, that we must conclude that subsection (b) of the Restatement requirements for a valid judgment in § 429, has also been met.

Did the Pennsylvania Decree of Permanent Injunction comply with the requirement of subsection (c), to the effect that the Court must not exceed its judicial jurisdiction in entering such a Decree?

Since the Court first acquiring jurisdiction has not merely the power but the duty to protect its jurisdiction, it may issue perfectly valid injunctions restraining a party from proceeding on matters arising out of the same subject matter in other Courts. Since, however, an injunction acts *in personam* against the injunction defendant, that defendant, to be bound, must be found to be personally within the jurisdiction of the Court. *Janney v. Janney,* 350 Pa. 133, 38 A(2d) 235 (1944).

This finding the Court makes (under present circumstances) on the unshakable premise that the injunction defendant (the appellee here) *is already subject to the Court's jurisdiction by virtue of her prior voluntary submission to it of the subject matter still unresolved. Dorney v. Dorney, supra; James v. Grand Trunk Western R. Co., supra; Doerr v. Warner,* 247 Minn. 98, 76 NW(2d) 505 (1956); *Bedient v. Bedient,* 74 N.Y.S.(2d) 456, 190 Misc. 480 (1947) (a case remarkably similar to the instant case in its factual background). Accord, *State Tax Commission v. Cord,* 81 Nev. 403, 404 P(2d) 422 (1965).

In *Dorney v. Dorney, supra,* a husband brought an action for divorce in New Hampshire and subsequently moved to dismiss the same. He then filed a divorce suit in Nevada. His wife filed a cross-petition for separate maintenance in the New Hampshire suit. Shortly thereafter, the husband was awarded a Nevada decree, no personal service on his wife having been made, nor did she appear in the suit. Under this decree, the husband was obliged to pay only $50 for her maintenance. In the meantime, the New Hampshire Court refused to dismiss the divorce action and entered a $250 order on the wife's behalf for her maintenance.

She subsequently sued for arrears accumulated under this order in the Federal District Court in West Virginia, which awarded her these arrears, and the husband appealed.

The Circuit Court of Appeals, in its opinion, quoted the following language from the opinion of the New Hampshire Court in support of its reasoning that New Hampshire's jurisdiction continued (pp. 202, 203):

> "The plaintiff chose his forum and submitted himself to the jurisdiction of the court by seeking a divorce. Until the voluntary dismissal of his action goes to judgment, he is subject to the court's jurisdiction. The defendant came into court seeking affirmative relief while the plaintiff's action was still pending and while plaintiff was represented in his action by counsel of his own choosing. . . . It has been a long standing practice to treat cross-petitions seeking affirmative relief as pleadings in the original action. No service thereon is required but copies of all pleadings filed in court

> are required to be forwarded forthwith 'to all other parties to the action or their counsel' . . . A copy of defendant's pleadings was sent to and received by plaintiff's counsel at the time of their filing in court. Jurisdiction over plaintiff in connection with the matters contained in the cross-petition was thereby secured."

Said the Court (after referring to the above language):

> "The New Hampshire court held, for the reasons set out in its opinion heretofore quoted, that it did" (have jurisdiction over person of husband). "We agree. The judgment was a valid one and the District Court, quite correctly, held that it was entitled to full faith and credit in that Court. The judgment of the District Court is affirmed."
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> *Supra,* at p. 207.

Since it is the validity of a Pennsylvania injunction that is being considered, however, it is Pennsylvania law that controls.

Pennsylvania follows the foregoing rule, this principle of law being understood and applied to situations identical to the case at bar.

In *Wenz v. Wenz,* 400 Pa. 397, 162 A(2d) 376 (1960), a wife sought relief in a Pennsylvania Court under an antenuptial agreement. Her husband appeared, and filed an answer denying the marriage, and then instituted an action for annulment in Maryland. Upon the wife's application for an injunction to restrain him from this suit, the husband attacked the jurisdiction of Pennsylvania to issue an injunction; and when it was granted, he appealed. Said the Court:

> "It is plain enough that Wenz, by his answer to the Complaint in Lehigh County, voluntarily put the validity of his marriage to the plaintiff in issue there and by subsequently instituting suit in the Maryland Court, for annulment of the marriage, contumaciously attempted to circumvent and subvert the authority and jurisdiction of the Lehigh County Court. In such circumstances, a court has not only the power but the duty to thwart such an undertaking by a restraining order adequate to the circumstances . . . In such a case it may restrain a party from prosecuting a subsequent suit in another jurisdiction, whether the objects of the two suits are the same or not, if the effect of the second suit is to withdraw from the court first acquiring jurisdiction a part of the subject matter of the first suit . . ."
>
> Accord, 43 C.J.S., *Injunctions,* § 49, p. 499.

In *Rothman v. Rothman,* 424 Pa. 406, 228 A.(2d) 899 (1967), a case on all fours with the case at bar, the husband, a defendant who had appeared by counsel and filed an answer to a Pennsylvania action for divorce, went to Nevada and instituted a Nevada action for divorce. Pennsylvania, on his wife's application, promptly enjoined him under the same principle. On appeal the Supreme Court affirmed and approved the *Wenz* rule, the Court stating (at 408, 9):

> "The court (below) based its conclusion on our decision in *Wenz v. Wenz,* 400 Pa. 397, 162 A.(2d) 376 (1960) . . .
>
> We hold that Wenz is controlling in this situation, and that the language of Rule 1503(a)(2) is consistent therewith. That rule states that:

> '. . . a judgment, order or decree shall not bind a defendant personally unless he is served within the County, or within the Commonwealth in conformity with Rule 1504(b) or unless he appears *or otherwise submits himself to the jurisdiction of the Court.*' (Emphasis supplied). We agree with the conclusion of the court below that it had twice obtained jurisdiction over appellant, in the divorce action and the action for support, in matters dealing with the marital affairs of the parties. The court, therefore, was justified in assuming jurisdiction in the equity proceeding, and we need not, nor do we, decide the propriety of the attempted service of process. Inasmuch as appellant had submitted himself to the jurisdiction of the court in the previous actions, its decree in the equity action may properly bind him."

Appellant respectfully urges that the *Wenz* and *Rothman* cases not only apply here, but their reasoning carries the force of a legal imperative: to hold otherwise would open a veritable Pandora's Box to the chicanery of every evasive party who seeks to benefit by circumventing the jurisdiction of our Courts. She may conceal her residence and claim she doesn't live there, hoping the Court will decide she has not been served. She may claim she has moved to A; her agent may claim she has moved to B; while in fact she has moved to C and concealed herself, hoping for the same result. The variations on these devices are virtually endless, being limited only by the ingenuity of the person involved to confuse the Courts, the issues, and the opposing party.

3. The fact that Pennsylvania herein entered a Decree of Injunction in Equity rather than a judgment at law in no way extinguishes or diminishes its right to recognition as a valid judgment under the *Restatement* rule, § 430 hereinabove set forth, if it otherwise qualifies.

> "An order, judgment, or sentence of a court of chancery is commonly termed a 'decree'. It is just as binding on the parties and conclusive as to the matters in controversy as is a judgment of a court of law; no distinction is to be drawn between the one and the other.[2] It may be presumed that a chancellor in a matter over which he had jurisdiction made a proper investigation as to the truth of the allegations contained in an application made to him.
>
> . . . A decree is final if it disposes of the cause or a part thereof, reserving no question or direction for future determination." 19 Am.Jur. §406, pp. 278, 279, citing *Beasley v. Texas & P.R. Co.,* 191 U.S. 492, 24 S.Ct. 164, 48 L.ed. 274 (1903).

Pennsylvania law has been in accord with both parts of the above principle for many years. *Evans v. Tatem,* 9 S. & R. 252, 11 Am.Dec. 717 (Pa. 1823); *Sundheim v. Beaver County B. & L. Ass'n,* 140 Pa. Sup. 529, 14 A.(2d) 349 (1940).

The Decree of June 24, 1964 permanently enjoining appellee from prosecuting her Nevada divorce action, *inter alia,* is emphatically urged by appellant to be a valid and final decree in accordance with the above

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[2]Citing *Hopkins v. Lee,* 19 U.S. 109, 5 L.ed. 218 (1821).

definition. The Learned Court below, for reasons which we will examine in a moment, held it to be "provisional and not . . . final" (CT 161). The face of the decree itself would certainly strongly suggest finality, stating flatly "It is Ordered and Decreed that a *permanent injunction* be and is hereby entered, herewith, against defendant . . . *permanently* enjoining and restraining her" from doing any one of six prohibited acts (all of which she has in fact done). It is difficult to imagine language more final in tone or spirit than this.

The generally accepted definition of a Permanent Injunction may be found in 43 C.J.S., *Injunctions* § 3, p. 408:

> "A perpetual or permanent injunction is one granted by the judgment which finally disposes of the injunction suit. It forms a part of the judgment in a hearing on the merits, and it can properly be ordered only on the final judgment. *Injunctions of this class are in no sense provisional remedies, but are always, and must be, final relief.*"

Accord, *Jackson v. Bunnell,* 13 N.Y. 216, 21 NE 79, 80 (1889); *Sheridan County Electric v. Ferguson,* 124 Mont. 543, 227 P(2d) 597 (1951); *Olsen v. Leith,* 71 Wyo. 316, 257 P(2d) 342 (1953).

Moreover, such a decree remains in force by its own nature. *NLRB v. Star Metal Mfg. Co.,* 187 F(2d) 856 (3 Cir. 1951).

There is no question that the old Federal test of finality was "the face of the judgment." *Haseltine v.*

Central Bank of Springfield (No. 1), 183 U.S. 130, 22 S.Ct. 49 (1901); *Gulf Refining Co. v. United States,* 269 U.S. 125, 46 S.Ct. 52 (1925); and *Moore v. Cotton Exchange,* 270 U.S. 593, 46 S.Ct. 367 (1926).

If, by this test or by any other involving a reading of the entire record, it is clear that the Pennsylvania Equity Court, after setting a hearing date of which all parties had reasonable notice (X 4, RT 8), adjudicated all the averments of appellant's complaint and gave him by this decree every item of relief he sought (X 2, RT 6, CT 185, 186, 244, 245), why does the Court below decide that it is provisional?

Because it "was issued in aid of the jurisdiction of the Pennsylvania divorce court." (CT 161).

Appellant respectfully submits that, under the law, this reason is without merit.

On this subject, a present judge of the Third Circuit Court of Appeals and a nationally recognized authority on Marriage and Divorce, makes the following observations:

> "The power of a court of equity to enjoin a person within its jurisdiction from prosecuting an action in the courts of another jurisdiction, is now a well recognized field of equity jurisprudence. The basis for the intervention of equity in such suits is usually said to be the suppression of vexatious litigation, the prevention of injustice by the furnishing of adequate relief, the avoidance of multiplicity of suits *and the protection of a jurisdiction already attached in a suit pending* or a judgment already entered.

"This power of equity is not novel. Indeed, injunction against proceedings at law was the very channel by which equity emerged as a distinct system of jurisprudence. It was because of the practice of the chancellor in granting injunctions against the institution of common law actions and the enforcement of common law judgments, that the historic struggle between equity and law reached its greatest height, a struggle which lasted for nearly two centuries until confirmed in favor of equity by a royal decree in 1616.

"The power of a court to enjoin proceedings in another court has been recognized by the Supreme Court of the United States and is a part of the federal law.[3] It has been adopted in the Restatement of Conflict of Laws[4]; and it has for a long time been recognized in Pennsylvania."[5]

". . . This equitable remedy, by which oppressive, vexatious or unfair resort to a foreign tribunal is enjoined in equity, is of special value in divorce proceedings. In such cases, the exceptional requirement that resort to the courts be limited to the jurisdiction of the domicile, invites the proverbial frequent attempts at circumvention. This pressure has been so pronounced that in the face of it a small number of states have abandoned the generally strong social policy against divorce and opened their borders as a refuge for persons seeking an easy severance of their mar-

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[3]Citing *Cole v. Cunningham,* 133 U.S. 107, 10 S.Ct. 269, 33 L.ed. 538 (1890) and other cases, particularly *Crosley Corp. v. Hazletine Corp.,* 122 F(2d) 925 (1941).

[4]§ 96. "A state can exercise through its courts jurisdiction to forbid a party, who is subject to its jurisdiction, to do an act in another state."

[5]Citing many cases going back to 1897.

> riage ties. In these states, formal obeisance is rendered to requirements of domicile and jurisdiction and even of limited statutory grounds for divorce, but so loose is the practice and so certain the favorable decree, that the judgments of their courts are with good reason regarded by their sister states as the fruit of unfairness and untruth and to be credited with but the barest minimum of recognition. In view of this, equity jurisdiction in the prevention of such unjust or fraudulent divorce suits is of increasing importance. "The general jurisdiction of equity to enjoin divorce proceedings has now been firmly recognized in a growing number of states."
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> 3 Freedman, *Marriage and Divorce in Pennsylvania,* § 804, pp. 1483-5 (2nd Ed. 1957).

Since basically, *every* injunction to restrain action in another state is "in protection of the jurisdiction" which issued it (as the foregoing analysis so succinctly reveals), does the Court below mean to suggest that *every* such injunction is provisional, and by its nature, *cannot* become permanent and final? Such an inference on our part is scarcely permissible, since it would involve the adoption of a novel principle of law at flat variance with the entire body of decided law on the subject.

Does the Court below, instead, regard merely *this* injunction to be "provisional" for reasons other than the foregoing one? If so, we search in vain for a single document, record or bit of testimony, or any stated reason arising therefrom, in support of the Court's conclusion in this regard. Against this void must be

placed not only the plain unambiguous language of the decree itself; the circumstances under which it issued pursuant to hearing (X 2, RT 6, CT 177, 217-245), its undeniable adjudication of the matters presented to the Pennsylvania chancellor for determination, and the categorical character of the relief granted (X 2, RT 6, CT 244, 245). To these we must add, in addition, the legal authorities defining a permanent decree.

Finally, however, we must note the authority of a line of Federal cases of appellate jurisdiction, whose ruling effectively precludes the Court below from inferences of its choice, supported or otherwise, as to the finality of this decree. The case of *Desjardins v. Desjardins,* 308 F(2d) 111 (6 Cir. 1962), which is typical, holds that where a decree of one state is the basis for action in the Federal Court of another (this case precisely), the Federal Court *is obliged to look to the law of the state entering the judgment to determine whether it is final.* Under this test, no further problem can exist: in Pennsylvania, this decree is final. See Pennsylvania cases cited *supra,* this Brief.

As such, then, it completely qualifies as a valid judgment under the Restatement, *Conflict of Laws,* § 429 rule and accordingly will be recognized, not merely as imposing a duty to obey it on the party against whom it was rendered, but "as determining . . . the status of the parties" (since that, too, was the purpose of the decree). See Restatement, *Conflict of Laws,* § 430, *supra.*

More specifically, under the unequivocal mandate of the Supreme Court of the United States in *Sutton v. Leib,* 342 U.S. 402, 72 S.Ct. 398 (1952) (a case which is, as will be shortly established, on all fours with the case at bar on all material facts), the Pennsylvania decree is entitled to Full Faith and Credit everywhere, in Nevada as well as Pennsylvania—even if this means that the Nevada decree must be stricken as void.

For this reason, it is respectfully submitted that the Learned Court below committed basic error when it first considered, passed upon, and accepted as valid the Nevada decree of divorce, as it were, *a priori:* i.e., without giving any previous consideration to the effect of Pennsylvania's decree on the Nevada proceedings, under the Full Faith and Credit clause and the doctrine of *res judicata.* The Court thus ignored the *caveat* contained in *Hanson v. Denckla,* 357 U.S. 235, 256, 78 S.Ct. 1228, 1241 (1957) that "the rule of primacy to the first final judgment is a necessary incident to the requirement of Full Faith and Credit."

Without such previous attention, the Court could (and did) find in appellee's favor on the only issue of fact present in the case: appellee's domicile between March 25 and May 7, 1964—a subsidiary issue which could only become of controlling importance if there was no Pennsylvania decree the validity of which as to Full Faith and Credit required prior determination.

However, as we have exhaustively established *supra,* we do have a valid final decree emanating from Penn-

sylvania with which both the Nevada state Court on July 6, 1964 and the Learned Court below on July 31, 1967 had to cope—*before* the Nevada divorce action could be considered on its merits. The problem now becomes, What issues are barred in Nevada as *res judicata* by the operation of the Full Faith and Credit clause?

The Court below based its attack on jurisdiction. Its rationale is that if appellee is *personally* subject to the jurisdiction of the Pennsylvania Court under the theory of the *Rothman* case, the decree is provisional; if she is not, then under the theory as it understands it of a recent Pennsylvania case[6] (of which it gives no facts), no findings of a Pennsylvania Court as to subject matter would be binding on us here.

Since it has already been shown that appellee was indeed personally subject to the jurisdiction of Pennsylvania under the *Rothman* rule, and the decree entered against her was nevertheless a final valid judgment, we are forced to conclude (at the very least) the following: that she may not proceed with her Nevada divorce action personally; that she may not permit or cause her agents to do so; that she may do nothing but instruct her agents to discontinue said action (see Pennsylvania Decree of Permanent Injunction, clause (e) (X 2, RT 6, CT 12)). A Court properly extending Full Faith and Credit to this Decree would accordingly find appellee to be an incompetent witness in the subsequent cause brought

[6]*March Estate,* 426 Pa. 364, 231 A(2d) 168 (1967), which will be examined *infra.*

before it; and would most certainly suggest to her counsel that they discontinue the action on her behalf. As Officers of the Court, it may be presumed they would do so. In any event, no divorce would issue, and even if it did so, it would be void for lack of a competent record.

For these reasons, it is respectfully urged that a final decree binding appellee is dispositive of all issues in the case at bar and dictates the relief sought by appellant: (1) that Full Faith and Credit be afforded to the Pennsylvania decree, and that appellee be held to be bound thereby; and (2) that, as a consequence, the Nevada divorce decree be declared void, and her subsequent marriage as bigamous. Nevada holds bigamous marriages to be void. *Poupart v. District Court,* 34 Nev. 336, 123 Pac. 769 (1912).

But even if the foregoing were not so, it does not necessarily follow that the Nevada Court will acquire jurisdiction over the subject matter to grant a resultant divorce, because the Pennsylvania injunction cannot preclude it from doing so. Nevertheless, this is the position taken by the Court below in its opinion, relying for its authority on 24 Am.Jur.(2d), § 1010, p. 1152. Appellant is obliged to point out that examination of this section *supra* reveals a formidable *caveat* to the expressed rule on the very next page: 24 Am.Jur.(2d) § 1010, p. 1153:

> "It would seem that if the defendant in the injunction suit, after commencing a divorce suit" (in another jurisdiction) "is served personally within the injunction state or appears in that ac-

> tion, *and the court determines that the defendant has not established a domicile in the divorce state, this determination of fact is res judicata in the divorce action.*"

For this proposition reference is made to another section (§ 972).

24 Am.Jur.(2d) § 1008, pp. 1149, 1150, clarifies the status of the law regarding service on the injunction defendant who has already subjected himself to the jurisdiction of the injunction Court by pointing out:

> "Where a wife has sued for a separation and the court has jurisdiction in personam over the husband, and the wife files a motion for an injunction after the husband has gone to another jurisdiction to obtain a divorce, the notice of the motion may be served on the attorney for the husband; it is not necessary to serve the husband within the state on a motion for an injunction."

This section bases this comment on *Garvin v. Garvin,* 302 N.Y. 96, 96 NE(2d) 721 (1951). To this appellant adds, Accord: *Dorney v. Dorney, supra; Wenz v. Wenz, supra; Rothman v. Rothman, supra;* and *Bedient v. Bedient, supra.*

It is Am.Jur.(2d) § 972, p. 1109 which finally and irrevocably explodes the theory relied on by the Court below to retain for Nevada jurisdiction to grant a divorce in spite of the Pennsylvania injunction:

> "So, too, where a court, on collateral attack, holds that a foreign divorce is void, the matter is res judicata between the same parties upon a second attack in another jurisdiction."

The authority for this principle is *Sutton v. Leib,* 342 U.S. 402, 72 S.Ct. 398 (1952). This famous case, one of the more recent of those Supreme Court decisions which have spelled out the implications of the *Williams v. North Carolina* rule, has elicited the following comment and analysis from Freedman:[7]

> "The coincidence of jurisdiction with full faith and credit has come to affect the validity in the decree-granting state of a divorce not entitled to full faith and credit elsewhere. In the second *Williams* case and the *Esenwein* case the divorces were refused recognition because North Carolina and Pennsylvania, respectively, found that the alleged domicile in Nevada was not *bona fide.* But there was no implication in either case of the invalidity of the decree in Nevada. And so it was assumed that the recent decisions of the Supreme Court of the United States left unimpaired the validity of a divorce—and a subsequent remarriage—in the decree-granting state. The problem was decided by the Supreme Court of the United States in *Sutton v. Leib.*"

As briefly as possible, the facts were as follows: W obtained a divorce in Illinois with permanent alimony as long as she remained unmarried. She later married X in Nevada, he having gotten that day a divorce in an *ex parte* proceeding. Shortly thereafter, X's first wife, who still lived in New York and had neither been served nor appeared in Nevada, brought a separate maintenance proceeding in New York against X, who defended. This resulted in a decree in her favor de-

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[7] 3 Freedman, *Marriage and Divorce in Pennsylvania,* § 787, p. 1438 (2d Ed. 1957).

claring X's Nevada divorce "null and void." As soon as X was served in this suit, W ceased living with him, and shortly thereafter brought against X in New York an action for annulment of their marriage. Once again, X appeared and the annulment was granted on the ground that X had a wife living at the time of the marriage. W now claimed in Illinois that alimony from her first husband was not terminated by her marriage, because it had been annulled by the New York decree.

The District Court entered summary judgment for W's first husband and the Circuit Court of Appeals affirmed on the ground that X's divorce and hence his remarriage, were valid in Nevada. The Supreme Court reversed, stating at 408, 409 (allowing ourselves the liberty of substituting the above letters for names):

> "W and X subjected themselves to the jurisdiction of the New York Court and its decree annulling their Nevada marriage was entered, so far as this record shows, of the parties and the subject matter. The burden is upon one attacking the validity of a judgment to demonstrate its invalidity.[8] That judgment is res judicata between the parties and is unassailable collaterally.[9] As both parties were before the New York court annulment of their Nevada marriage ceremony is effective to determine that the marriage relationship of W and X did not exist at the time of filing the present complaint (of W) in Illinois

[8] *Barber v. Barber*, 323 U.S. 77, 86; *Cook v. Cook*, 342 U.S. 126, 128.

[9] *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 76-78.

for unpaid alimony. The effect in Illinois of the New York declaration of nullity *on the obligation for alimony* is a matter of Illinois law hereinafter treated. The New York annulment determines the marriage relationship of W and X, just as any divorce judgment determines such relationship. If the Nevada court had had jurisdiction by personal service in the state or appearance in the case of X and his first wife, its decree of divorce would have been unassailable in other states.[10] So as to the New York decree annulling the marriage, New York had such jurisdiction of the parties and *its decree is entitled to full faith throughout the Nation, in Nevada as well as Illinois.*[11]

"The New York invalidation of the Nevada decree of X and his first wife stands in the same position. As the first wife was neither personally served in Nevada nor entered an appearance, *the Nevada divorce decree was subject to attack and nullification in New York* for lack of jurisdiction over the parties in a contested action.[12]"

Since it was X who secured the *ex parte* Nevada divorce, and his first wife who attacked it collaterally with success in the state of her residence, by simple transposition of X into appellee, and first wife into appellant, the position of the instant parties as controlled by this decision is absolutely clear; and if we substitute for the double actions of separate main-

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[10]*Sherrer v. Sherrer,* 334 U.S. 343.

[11]*Treinies v. Sunshine Mining Co., supra; Milliken v. Meyer,* 311 U.S. 457, 462.

[12]*Cook v. Cook, supra; Williams v. North Carolina,* 325 U.S. 226; *Rice v. Rice,* 336 U.S. 674.

tenance and annulment the equity action for an injunction, which inevitably will have the same effect, *Sutton v. Leib* (insofar as our issues alone are concerned) and the case at bar are on all fours.

It must be noted that in one respect at least the instant case is stronger for appellant than the *Sutton* case. In our case, appellant did not wait until the Nevada divorce had issued to do something; he proceeded with such vigor in his attack on the Nevada action that he secured not merely a valid judgment, but the *prior* judgment, and it is precisely this judgment that Nevada faced on July 6, 1964. This decree, says *Sutton,* "is entitled to full faith throughout the Nation, in Nevada as well as Illinois.": *Supra* at 409. The automatic result is that it operates as a bar to the Nevada action, which is accordingly void. This appellant specifically alleged in his Complaint in the Action for Declaratory Judgment.

Nor, appellant submits, can any meaningful distinction be drawn because in *Sutton,* the New York defendant not only appeared but fought, while in the instant case appellee did not actively contest.

First of all, the judgment of a Court of general jurisdiction carries a presumption of jurisdiction, and the burden of showing lack of jurisdiction is upon the party so asserting. If it (the judgment) "appears on its face to be a record of a Court of general jurisdiction, *such jurisdiction over the cause and the parties is to be presumed* unless disproved by extrinsic evidence, or by the record itself . . ." and the

burden of undermining the decree of the sister state "rests heavily upon the assailant." *Williams v. North Carolina,* 325 U.S. 226, 233-4, 65 S.Ct. 1092, 1097 (1945). See, also, *Com. ex rel. McVey v. McVey,* 383 Pa. 70, 118 A(2d) 144 (1955); *Com. ex rel. Spader v. Myers,* 187 Pa. Sup. 654, 145 A(2d) 870 (1958).

She was, moreover, in legal contemplation personally in the Court, and could have litigated any issue she chose. Where the proceedings involved (as they did in the Pennsylvania equity action) questions of jurisdiction over both person and subject matter, the accepted rule is that the following adjudication is *res judicata* on the question, since appellee had a full opportunity to litigate those issues. *Sherrer v. Sherrer,* 334 U.S. 343, 68 S.Ct. 1087 (1948); *Coe v. Coe,* 334 U.S. 378, 68 S.Ct. 1094 (1948); *Johnson v. Muhlberger,* 340 U.S. 581, 71 S.Ct. 474 (1951).

In *Stoll v. Gottlieb,* 305 U.S. 165, 59 S.Ct. 134 (1938), Mr. Justice Reed, speaking for the Court, states (at 171, 172):

> "Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction *over the parties and its subject matter.* . . ."
>
> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is

no reason to expect that the second decision will be more satisfactory than the first. . . ."

In *Johnson v. Muhlberger, supra,* the defendant was served with process but did not appear either personally or by counsel; and his daughter, as his heir, was held barred on the basis of the rule *supra* from attacking the jurisdiction thus secured.

Freedman, commenting on this situation, concludes:[13]

> "The doctrine of non-finality of the finding of jurisdiction has now lost its formerly absolute character, and its boundaries have been reduced. The old rule is left to operate only where the jurisdictional finding is *ex parte* and uncontested. For manifestly the rule derived from the Davis, Sherrer and Coe cases will not be held inoperative merely because the defendant who appeared did not specifically raise the question of jurisdiction." (citing *Stoll v. Gottlieb, supra*) "And it should in reason be of no significance that *a party who had the opportunity to contest jurisdiction failed to do so. To fail in such a case to raise the question of jurisdiction is to concede its existence.*"

Once again, Pennsylvania law is in accord. *Harrison v. Harrison,* 183 Pa. Sup. 562, 133 A(2d) 870 (1957); *Collins v. Collins,* 175 Pa. Sup. 214, 103 A(2d) 494 (1954).

Since, further, under Pennsylvania practice, suits in equity conform to actions in assumpsit: Pa. R.C.P. § 1501: and in assumpsit actions, failure to answer an

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[13]3 Freedman, *supra,* § 792, pp. 1456, 1457.

averment in the Complaint upon proper notice to plead thereto is an admission of the same: Pa. R.C.P. § 1029(b): it follows automatically that *appellant's undenied averments of appellee's Pennsylvania residence and domicile* in Paragraphs 3, 4, 7, 8 and 14 of his Pennsylvania Complaint seeking an injunction and carrying such notice (X 2, RT 6, CT 180-181, 185, 192) *are thereby admitted by appellee.*

The foregoing, appellant respectfully submits, is his view of the assertion of the Court below, based on 24 Am.Jur.(2d) § 1010, p. 1152, that even if the injunction were personally binding on appellee, it "cannot operate to preclude the Nevada divorce court from acquiring jurisdiction of the subject matter and granting a valid divorce." (CT 160).

The opinion of the court below admits that the Nevada court had no personal jurisdiction over appellant in the Nevada divorce action (CT 157). Since that same court was likewise barred, by *res judicata,* from finding that *appellee* was domiciled in Nevada, it is submitted that it becomes not merely difficult, but impossible, for Nevada to have granted a "valid" divorce, *since it had no jurisdiction over either party.* Under such circumstances, it has always been the law in this country that the court itself is without jurisdiction to affect the marriage status. *Bell v. Bell,* 181 U.S. 175, 21 S.Ct. 551 (1901) and many other cases; Restatement, *Conflict of Laws,* § 111; see, also, annotations in 105 A.L.R. 817 (1936).

In fact, even the physical presence of plaintiff and an appearance entered by the defendant in a court

barred, by the presence of some constitutional requirement not met (as here, Article IV, Section 1 and the resultant *res judicata*) from finding at least one of the parties to be domiciled therein, results in a decree which violates the Fourteenth Amendment as lacking in Due Process of Law. *Alton v. Alton,* 207 F(2d) 667 (3 Cir., 1953); *Granville-Smith v. Granville-Smith,* 214 F(2d) 820 (3 Cir., 1954).

Appellant respectfully urges, however, that the Learned Court below, in arriving at certain other basic findings of fact, drawing inferences therefrom, and arriving at certain conclusions of law, committed fundamental error. These will each be noted as briefly as circumstances permit.

A. Even in validating the Nevada decree by the factual finding that appellee was a *bona fide* domiciliary of Nevada after March 25, 1964, the opinion is illuminating, *since not one item of evidence is adduced in that opinion to support the finding.*

The testimony of appellee (on which that finding was necessarily based) however, was as follows: that she went to Nevada on March 24, 1964, on the advice of her Pennsylvania attorney (RT 12) for the purpose of securing a divorce (RT 12), her Pennsylvania attorney having previously arranged to have her represented by Nevada counsel (RT 12); that she put up at a motel (RT 11) under an alias she had never previously used (RT 12), because she didn't want her husband to know where she was (RT 16, 27), and commenced her Nevada action on May 7, 1964 (RT 13), the first day available to her under Nevada law;

that she spoke to her Pennsylvania counsel the first week she was in Reno (RT 22); that she knew she was involved in marital proceedings in Pennsylvania when she left (RT 12); and that George Sirott (her present alleged husband, who appellant had averred in a Pennsylvania pleading filed on February 26, 1964 to be her paramour and a wealthy man) (X 1, RT 6) had his business in Camden, New Jersey (RT 20), to which Riverton, New Jersey is "very close" (RT 20).

She was then confronted with four letters,[14] all in her own handwriting (X 15-18, RT 13-15, 18, 19) all postmarked from either Camden or Riverton, New Jersey, the postmarked dates being, respectively, March 31, April 28, May 6, and May 6, 1964 (X 15-18). She admitted mailing the March 31, 1964 letter (RT 14), but claimed (after making the admission as to the first letter) that she mailed the balance to New Jersey. She admitted that on both the March 31 and April 28 letters she had written as the return address the one known to be her home in Pennsylvania (RT 20, 21), the same address she averred in commencing her Pennsylvania divorce action (X 1, RT 6). She then was questioned concerning depositions she had given only 5 days before trial, i.e., on July 26, 1967 (RT 26) in which she had testified she had written no letters during her stay in Reno prior to the divorce (RT 23) and during that time she did not use her Pennsylvania address on any letters (RT 24). She further testified that her children had remained with appellant after the parties separated (RT 29) and

[14]X 16 is an envelope only.

that she had prosecuted him for "stealing" her clothes at that home after the separation, in Pennsylvania (RT 29). She claimed friendly relations with her father, with whom appellant did *not* live (RT 27, 28) but he was the recipient of one of the May 6 letters postmarked Camden, New Jersey (X 18, RT 19). Inspection of this document reveals no reference to Reno (X 18). She married Sirott the same day she got her divorce (RT 30) at which ceremony her Nevada counsel were her witnesses (X 12, RT 13).

The foregoing represents the sum total of the evidence most favorable to appellee, her own testimony; yet it will be noted that the testimony surrounding the letters necessarily involved her in perjury.

On July 26, 1967 she had testified under oath that while in Reno prior to her divorce she had not only *not* used her Pennsylvania address on any letters, she had written no letters at all (RT 23, 24). It follows that if this statement is true, if she did not write these letters in Reno, she was not in Reno on March 31, April 28 and May 6, 1964. Since, however, Nevada law requires (as we know) *six weeks continuous physical residence within that state* before an action for divorce can be instituted, and all these dates are within this period, she felt obligated to testify that she was there. The statements being clearly contradictory, one of them must be a lie.

Appellant has always contended that appellee was then living at 1355 Overbrook Road, Montgomery County, Pennsylvania, and frequently commuted thence to Camden, New Jersey, the location of Sirott's

business (RT 20) (a distance of some 20 miles, as a map of the area will indicate). If this was so, then the presence of her return address in Pennsylvania on two envelopes, written in her own hand, and the postmarks from Camden and Riverton, New Jersey are easily explained—but in this event, she was not in Reno during this period.

Even without the letters, there is little doubt what a Pennsylvania Court would have held. In *Com. ex rel. McVey v. McVey, supra,* the Court reviews the facts therein (at 73-75):

> "(Defendant) admitted that his primary reason for moving to Nevada was to obtain a divorce; on the very day of his arrival in Las Vegas he consulted an attorney whom he had previously retained for that purpose, and he started proceedings immediately after the required six weeks' residence. While the motive that impelled him to seek the new domicile is not in any sense conclusive it does constitute an important factor to be taken into consideration in determining whether he really intended to make his home in Nevada. When he came to Las Vegas he took a room in a private dwelling; there he was joined by his former secretary, whom he married five days after his divorce was granted; the wife had claimed in the Florida divorce action that this secretary was the cause of their domestic difficulties."

The recital of facts *supra* differs in three respects from the case at bar: (1) Appellee went to Reno, not Las Vegas; (2) she took a room in a motel, not a private dwelling; (3) she married the man claimed to

be the cause of the marital difficulties the same day the divorce was granted her, not five days later. Appellee can hardly claim these distinguish her case from the cited one in a manner favorable to her.

The *McVey* defendant also surrounded himself, *after the decree,* with various indicia of domicile: opened a bank account, had a phone listed in his own name, etc., and remained in Nevada for some time thereafter. The Court, remaining undeceived, held that he did not secure a *bona fide* divorce and explained:

> "This was because the superficial indicia of domiciliary intent were outweighed in the total factual picture by the unavoidable inference that, *having gone to Nevada for the sole purpose of securing a divorce and marrying his former secretary,* (he) undertook to work there at casual and temporary jobs merely while marking what he considered *sufficient time to give color to his alleged acquisition of a bona fide domicile.*"

Since various aspects of the instant litigation have continued for over three years, and Sirott, never having relinquished control of his flourishing New Jersey operations, has ample means to do, he can afford additional time to continue to "give color" to such "domicile."

A recent case emanating from the same Pennsylvania Court that issued the injunction in the case at bar has peculiar relevance to our inquiry at this point. In *Sirott v. Sirott,* 85 Montg. L.R. 228 (Pa. 1965), the husband, without instituting any prior action in Pennsylvania, commenced a Nevada action for divorce.

His wife, at the Pennsylvania domicile (who had never been served or appeared in the Nevada action), promptly secured an *ex parte* preliminary injunction to restrain him from proceeding with this action, sending him a notice of same (which he received) before he secured his decree of divorce in Nevada. At hearing on the injunction, the wife sought and obtained a ruling that her husband was in contempt, with the resultant issuance of a bench warrant. The husband, who had neither appeared nor answered at this hearing, then filed Preliminary Objections raising the question of jurisdiction. She filed an Answer thereto denying his claim of a new Nevada residence and domicile, but the husband did not support his allegations with any testimony.

Since the husband, as noted *supra,* had not submitted his marital status previously to this Court, he could only be subject personally to the Court's jurisdiction if still a resident of Pennsylvania; and the Court accordingly directed its attention exclusively to this problem (at p. 230):

> "The cases require that the court make a determination that the defendant is a domiciliary of Pennsylvania: *Wallace v. Wallace,* 371 Pa. 404 (1952); *Smith v. Smith,* 364 Pa. 1 (1950). It is the court's conclusion that defendant has not effectually terminated his residence in Montgomery County, Pennsylvania. He is therefore subject to the jurisdiction of this court for the purposes of this action. The words of Justice Drew in *Smith v. Smith, supra,* at page four, are applicable here: 'It is not disputed that defendant was for some years a Pennsylvania domiciliary. *That domicile*

having been shown to exist, it is presumed to continue until another domicile is affirmatively proven. Pusey's Estate, 321 Pa. 248, 184 A. 844; *Price v. Price,* 156 Pa. 617, 27 A. 291. *The burden is on the one alleging a change of domicile to prove residence in a new locality and the intention to make that his permanent home*: *Barclay's Estate,* 259 Pa. 401, 404, 103 A. 274; *Chidester v. Chidester,* 163 Pa. Sup. 194, 196, 60 A(2d) 574; *Reimer v. Reimer,* 160 Pa. Sup. 509, 513, 52 A(2d) 357; *Alburger v. Alburger,* 138 Pa. Sup. 339, 10 A(2d) 888.'"

We note at once that the principles invoked by the Court are such a basic part of Pennsylvania law and so amply supported by decisions, that *only one* of the cases cited by appellant in support of the same propositions is cited by the Court, which also relies on many others.

Appellant suggests that a finding in the case at bar of Nevada domicile on such evidence is grossly against the weight of the same, and is of the type that provoked one Court, after reviewing similar evidence, to speculate that (at p. 442):

> "the therapeutic properties of the climate of our sister Commonwealth are marvelously stimulative to credulity . . ."
>
> *Meng v. Meng,* 47 D. & C. 429 (Pa. 1943).

B. Appellant is obliged to take vehement exception to two glaring misstatements of fact contained in the opinion of the Learned Court below because, although doubtless inadvertent, they give rise to inferences drawn by the Court concerning appellant's good faith

in the conduct of all aspects of this involved litigation; and those inferences cannot but be calculated to place him in the worst possible light before your Honorable Court.

1. After noting that appellee instituted her divorce action in Pennsylvania on December 19, 1963, the Court then states that he "filed an Answer on May 1, 1964" (CT 158). The clear implication is that nothing else happened in between, and that appellant did not bestir himself for 4½ months until, on the very eve of his wife's institution of Nevada proceedings (and perhaps because he suspected this might occur) he then filed an Answer.

The record discloses, however (X 1, RT 6, CT 263, 264), that he filed an appearance and Warrant of Attorney on January 9, 1964; ruled his wife for a Bill of Particulars on that same date; on February 26, 1964, two days after his wife petitioned for alimony, filed an Answer to the same averring Sirott to be her paramour; filed a Notice of intention to take her Depositions on April 2, 1964, and when confronted by her Motion for Protective Order, filed an Answer thereto on April 17, 1964. Counsel actually appeared in Court in connection with these motions on March 6, April 17, and May 1, 1964.

This is hardly the picture one visualizes in the opinion, but the Learned Court below feels it appropriate to comment:

> "Hindsight persuades us that if (appellant) had accelerated the Pennsylvania divorce action to trial and final decision with vigor equal to that

> used in bombarding appellee, her attorneys, the Attorney General of Nevada, and four Nevada District Judges with injunctive orders, he might have accomplished his objective of retaining an estranged wife within the matrimonial web."

Sight of the more ordinary type may lead others to conclude, however, that he had instituted a most active defense, and if the Pennsylvania matter presently languishes, it is because appellee (who is the plaintiff) has, under present circumstances, no urgent desire to proceed, certainly not to have her depositions taken.

It is unfortunate that said Court below felt itself obliged to re-echo, in almost the same words (X 3, RT 7, CT 43, 161), the sentiments of the Nevada state Court granting the divorce on July 6, 1964 when alluding to the receipt by it of the Permanent Decree of Injunction from Pennsylvania. Those sentiments were, no doubt, the product of righteous indignation at what it regarded as unwarranted interference with the performance of its duties. Under the facts of this case, however, they may also be viewed as mere pique at receipt of documents erecting an impregnable constitutional bar to a proceeding, which the Court fully intended to, and did, ignore in carrying its own case to conclusion. It could not have been the tone of the letters conveying the notice and Decree of Injunction which aroused the ire of the Court; this was respectful and not in the least peremptory, as the record indicates (X 2, RT 6, CT 231, 232); it could only have been receipt of the Decree itself which was so objectionable.

2. Appellant feels obliged to point to another statement contained in the opinion of the Learned Court below. On July 5, 1967, that Court dismissed appellee's Motion for Summary Judgment in an opinion in which it stated (CT 106): "In neither the Nevada divorce action *nor the Pennsylvania injunction action, however, did the Court have or claim personal jurisdiction over both parties.*" This observation is repeated in the opinion under review, and precedes the statement that Pennsylvania's claim to jurisdiction over both parties and subject matter first came to its "attention on July 10, 1967." (CT 159).

In view of the averments contained in Paragraphs 3, 4, 7, 8 and 14 of appellant's Complaint in Equity filed in Pennsylvania on May 20, 1964, exemplified copies of which have been of record in the case at bar virtually from its inception (X 2, RT 6, CT 173), all of which categorically aver just such jurisdictional claims; and the Complaint in the Action for Declaratory Judgment itself, filed May 26, 1966 with the Court below (CT 2-7), in which not only appellant but also the Pennsylvania Court claimed such jurisdiction in Paragraphs VIII, IX, XIII(e), XIV, XVI, XVIII, XX, and XXI, appellant can express only the most complete puzzlement as to the origin of the Court's impression.

C. The Learned Court below admits, albeit "reluctantly," as he puts it (CT 159), Pennsylvania's jurisdiction over appellee's person in this Injunction suit, under the authority of the *Rothman* case, *supra*. This reluctance stems, we are told (CT 160), from the

language of a letter sent by appellant's attorney to appellee's Pennsylvania divorce attorney giving notice of the final hearing (CT 160), which the Court construes as a tacit admission of appellant's belief that such service would be ineffective, the *Rothman* case not having been decided until almost three years later.

It is respectfully submitted that this construction is patently faulty, for three reasons: (1) the *Rothman* case was itself based on *Wenz v. Wenz, supra, decided four years before the service in question* and certainly not unfamiliar to appellant; (2) If appellant's counsel had not deemed that service valid, he would not have made it—and it was the most important service of all, since it is the only one the Court below recognized (CT 159); and (3) The language of the letter referred to could lead with equal force to the correct and true inference: that appellant's counsel recognized that appellee's local Pennsylvania lawyer was engaged in a legal maneuver that (as he thought) might yield appellee some tactical advantage.

D. We must now give careful consideration to the Pennsylvania case of *March Estate,* relied upon so heavily by the Learned Court below to establish that, apparently, the Pennsylvania Court did not, in this injunction action, pass on the question of a Nevada domicile and that, accordingly, that finding is not *res judicata* in Nevada (which can then find appellee to be a Nevada domiciliary and secure jurisdiction). The Court below claims for the facts of the *March Estate* case a "four-squareness" with those of the case at bar amounting to "an almost incredible coincidence." (CT 161).

In *March Estate,* 426 Pa. 364, 231 A(2d) 168 (1967), those facts are as follows:

March had seven children by a first marriage who are his sole legatees. He married for a second time in 1955, husband and wife separating in 1956. He started a divorce action in York County, Pennsylvania, at that time, which he never subsequently pursued. He and his wife never lived together following the 1956 separation.

In February, 1962, March gave up his home in Pennsylvania; in March, 1962, he voluntarily surrendered his real estate broker's license, and in April, 1962, he went to Nevada. On June 1, he commenced a divorce action there; and on June 11, 1962 his wife sought, and secured, *a preliminary injunction* in York County. This, of course, was not served on March himself, service being made on an attorney "who had previously been employed at various times by March"; March himself received a notice of this injunction in Nevada. *The opinion discloses no further progress in this injunction action.* His wife had neither been served nor appeared in the Nevada action.

March got his Nevada decree on June 29, 1962 and continued to reside in Nevada until April, 1963, after which he "lived in various other states, including Florida and Arkansas" (at p. 367). Apparently elderly or in ill health, he resided in Orlando, Florida and Hot Springs, Arkansas. He returned to Pennsylvania "on two occasions" for "very short periods of time" (at p. 367) prior to his ultimate return to a nursing home in York County, where he died in November, 1965.

The second sentence of the opinion of the Pennsylvania Supreme Court, on review, states: "*The sole issue on appeal* is whether the Court below was correct in holding that the Full Faith and Credit Clause of the Federal Constitution, Article IV, § 1, did not require it to honor this Nevada divorce decree." (at p. 365).

After reviewing the foregoing facts, it carefully distinguishes *Com. ex rel. Esenwein v. Esenwein,* 348 Pa. 455, 35 A(2d) 335 (1944) and *Com. ex rel. McVey v. McVey, supra,* on the ground that in the former, the record disclosed the party securing the decree left the state immediately thereafter (at p. 369) and in the latter, that it disclosed he went to Nevada to secure a divorce and marry his secretary (at p. 370). The Court accordingly, and appellant submits, correctly, finds the Nevada decree valid and entitled to Full Faith and Credit.

Appellant also submits there is absolutely nothing to be found in this opinion, either as to facts or law, which disturbs, limits or qualifies any of the massive body of case law and authorities hereinabove set forth that would serve to nullify the full legal impact of the Rapoport Permanent Decree in the case at bar.

Of course, the "sole issue" the appellant could raise, in the *March* case, was the validity of the Nevada divorce decree: *there was no other valid final decree present in the case.*

And, as appellant has had occasion to note, almost at the outset (This brief, pp. 13, 14), under the uniformly accepted view of the law set forth in the Re-

statement, *Conflict of Laws,* § 429(a), only a decree entered "after reasonable notice and an opportunity to be heard has been given to all persons to be bound" is entitled to recognition in other states (Restatement, *Conflict of Laws,* § 430). A preliminary injunction issued on an *ex parte* affidavit, without hearing, simply does not qualify; but that is all the *March* appellee had.

Moreover, the opinion *does not even disclose that the attorney notified* of the entry of the Preliminary Injunction, presumably on March's behalf, *was his attorney of record in the six-year-old divorce case instituted in 1956.* Under these circumstances, the "service" was gratuitous, since it did not even serve the purpose of notifying someone in authority in the other state of the pending proceedings. This at least the notifications to the Courts, in the case at bar, accomplished.

What appellant submits is the basic error of confusing the *March* situation with the instant facts may arise out of unfamiliarity with Pennsylvania procedure in these cases.

Freedman describes the process as follows:[15]

> "(Plaintiff files his) complaint in equity and on *ex parte* affidavits obtains a temporary injunction pending a hearing. The court customarily directs supplemental service by registered mail of a copy of the complaint, the temporary injunction and the order directing such service, on the defendant in the foreign state and on (her) attorneys who represent (her) there. The regular

[15]Freedman, *supra,* § 805, p. 1490.

> service is also made, pursuant to the plaintiff's view of the (wife's) residence, by leaving it at the address which plaintiff claims is still the defendant's residence in Pennsylvania. Such service having been made, and the defendant not appearing, it will ordinarily follow that an injunction ultimately will issue in final form."

Three things in the foregoing description will be noted at once: (1) It does not visualize the existence of a current Pennsylvania action for divorce, since no mention is made of service on local divorce counsel. It is assumed that defendant has left the state without subjecting herself previously to the jurisdiction over the subject matter; (2) The preliminary injunction is merely temporary, pending a hearing; (3) After notice as described *supra,* and after hearing, *even if defendant does not appear,* a permanent injunction issues.

The instant injunction is final; the *March* was temporary.

But (the Court below may have reasoned), the *Rothman* rationale (and *Wenz)* claims Pennsylvania jurisdiction without service; why was *March* not similarly subject to Pennsylvania's jurisdiction? He had, after all, commenced (even if he did not pursue) a divorce action there six years before.

The answer, appellant suggests, lies in the specific language of both the *Wenz* and *Rothman* decisions. As actually set forth in the opinion of the Court below (CT 160), it is based on the thrust of the following reasoning: *where it is clear to the Court* that one

party, already before it on the same subject matter, *is contumaciously attempting to circumvent and subvert its authority and jurisdiction,* it will act to thwart that undertaking.

Can any reasonable person, under the facts of the *March* case, find it clear that March actually went to Nevada *in order to subvert and circumvent* the authority of the Pennsylvania Court where he had started, and abandoned, a divorce action *six years before,* an action which was truly dormant? Appellant flatly rejects such a notion, and so, he submits, would any Pennsylvania Court. But that question was never reached in the *March* case, because only a temporary injunction was involved.

It is for this reason that the Supreme Court of Pennsylvania (to the apparent surprise of the Court below) did not discuss the *Rothman* case, which it had decided only 57 days before: the issues were different, and different principles of law applied.

Accordingly, the "incredible coincidence" which the Learned Court below finds between a six-year-old dormant divorce and *one in which the parties were in another Court six days before,* presents an analogy so strange as to border on the grotesque.

E. Moreover, the critical inferences which it draws from the failure of the Pennsylvania Court to make findings of fact, and the use it makes of them (CT 160, 161, 162):

> "We have observed that the Pennsylvania equity courts made no findings of fact. None were required as a predicate for the injunction because,

> under the *Rothman* case, the basis for the injunction was the pendency of the Pennsylvania divorce case. . . . For the Pennsylvania divorce court to have had continuing jurisdiction over the marital res, it need have found only that one of the spouses, Irvin Rapoport, was a bona fide domiciliary of Pennsylvania. . . . Thus, the bona fides of *Rose Rapoport's Nevada domicile was not necessarily involved* in the determination to issue the injunction *and a finding on that issue* by the Pennsylvania equity court *is not necessarily implied.* . . . We conclude that the Pennsylvania Courts have never adjudicated the bona fides of Rose Rapoport's Nevada domicile and that" (we are entitled to make) "the finding we have made sustaining her Nevada domicile in support of the Nevada divorce decree . . ."

: are categorically not permissible under the law. That law, unchallengeably, is that of Pennsylvania. The Court has drawn these inferences not to sustain, but to destroy, Pennsylvania's jurisdiction in a case where that Court found, *without any opposing testimony from appellee,* that it had jurisdiction, and that it had such jurisdiction *over both parties and subject matter.* These inferences thus fly squarely in the face of the mandate concerning *presumption of jurisdiction* contained in the second *Williams* case *(supra,* this Brief). It also flies in the face of Pennsylvania law.

When considering the extension of Full Faith and Credit to a decree of a sister state, *the Court is not permitted to examine into the reasons which moved the Court issuing the decree to rule as it did. In re Higbee's Estate,* 372 Pa. 233, 93 A(2d) 467 (1953).

F. One final observation: The Court below has noted, correctly, that real estate in Pennsylvania—the marital domicile which is the home of appellant and his children—will be affected. It will, in fact, be subject to partition and sold. For this additional reason, appellant contends, the validation of this void Nevada decree constitutes a violation of the Fourteenth Amendment, in that it will deprive him of property without Due Process of Law.

That appellee (although she admitted she knew these facts) brought neither the existing Pennsylvania divorce action nor her activities up to May 1, 1964 therewith, to the attention of the Nevada Court, is beyond question. Proof that the Nevada state Court, its clerk, her attorney (as in all states, an officer of the Court) and she herself, had knowledge of the Pennsylvania Injunction of June 24, 1964 when she entered the Reno Court on July 6, 1964, is not only beyond question, but overwhelming.

CONCLUSION

For all of these foregoing reasons: that the Pennsylvania decree was a valid final judgment, and as such, was entitled to Full Faith and Credit under Article IV, § 1 of the Constitution of the United States; that, moreover, it was the *prior* valid judgment, and thus served as a bar to any Nevada proceedings on the same subject matter as *res judicata;* that the subsequent Nevada decree was void for lack of jurisdiction, and its entry a violation of the Due

Process clause of the Fourteenth Amendment; that this case is controlled by the principle of *Sutton v. Leib,* the Pennsylvania decree being valid everywhere in the United States; and that the *March Estate* case is readily distinguishable: for all of these reasons, appellant respectfully submits, your Honorable Court should reverse the judgment of the Court below, declare the Pennsylvania decree to be valid, and the Nevada Decree of Divorce (and the subsequent alleged marriage based thereon), null and void.

Dated, San Francisco, California,
January 8, 1968.

Respectfully submitted,
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SHELDON W. FARBER,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

SHELDON W. FARBER,
Attorney for Appellant.

(Appendix Follows)

Appendix

Appendix

LIST OF EXHIBITS

No.		Identified	Offered	Received or Rejected
1.	Exemplified Pleadings, Pennsylvania Divorce Action	6	6	6
2.	Exemplified Pleadings, Pennsylvania Injunction Action	6	6	6
3.	Divorce Records, Nevada divorce	7	7	7
4.	Sealed Envelopes and Open Envelopes with Contents and Return Receipts	7, 8	8	8
5.	Letter dated 10-29-64	13	13	13
6.	Letter dated 7-21-64	13	13	13
7.	Note in the amount of $1466.67	13	13	13
8.	Stock	13	13	13
9.	Bank Book for Mrs. Joan Rose Sirott	13	13	13
10.	Bank Statement	13	13	13
11.	Bank Book for George or Joan Sirott	13	13	13
12.	Certificate of Marriage	13	13	13
13.	Lease Agreement	13	13	13
14.	Bank Statement	13	13	13
15.	Envelope and Contents postmarked 3-31-64	13, 14	14	14
16.	Envelope postmarked 4-28-64	15	16	16
17.	Letter and Envelope postmarked 5-6-64	18	19	19
18.	Letter and Envelope postmarked 5-6-64	19	20	20